In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-49

SUNSET COVE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the courts below erred in holding that the sand spit which petitioner filled without obtaining the consent of the Corps of Engineers was below the mean high water line and was thus subject to federal regulation pursuant to 33 U.S.C. 403.

The Necanicum River flows into the Pacific Ocean between the towns of Seaside and Gearhart, Oregon, creating an estuary of tidal flats and shallow water. The river mouth meanders through the estuary moving the sandbars near the mouth as it does so. When one of the sandbars was in front of petitioner's riparian property, petitioner, without seeking or receiving the consent of the Corps of Engineers, deposited fill material on it to stabilize its position so that it could use the bar for commercial construction (Pet. App. B, 1b-6b).

The district court found as facts that the river is navigable at the area in question (Pet. App. B, 9b-15b) and that the majority of petitioner's fill (Pet. App. B, 20b-21b):

> * * * [was] on land, a substantial part of which was below mean high water at that time or shortly before, and most or all of which is below mean high water from time to time. It now extends across almost half of the range within which the mouth of the river has migrated in the past. The river, therefore, is confined to half the distance previously available to it.

The district court, admitting that it is difficult to determine exactly how much of the fill was illegal, established as a practical demarcation the line of substantial fast vegetation and ordered petitioner to remove the fill beneath that line (Pet. App. B, 35b).

The court of appeals affirmed the district court's finding that a substantial part of petitioner's work was done below the mean high water line of the river and was thus in violation of 33 U.S.C. 403 as the consent of the Corps of Engineers had neither been sought nor obtained. It modified the relief decreed, however, to relieve petitioner of the obligation of removing the fill it had put in, requiring it to remove only as much of the rip-rap (rock embankment) as necessary to permit the river to re-establish its natural course. It also permitted petitioner to apply to the Chief of Engineers for an after-the-fact permit for any part of the previous construction the Chief of Engineers may recommend for approval (Pet. App. A, 1a-2a).

1. The decision below is correct, primarily concerns applying established law to the peculiar facts of this case, and presents no issue warranting further review. As the district court recognized in an opinion on which, together with the opinion of the court of appeals, we

primarily rely, the water levels near the mouth of the Necanicum River are affected by an interplay of forces—the tidal action of the Pacific Ocean and the swift currents of a river originating in the mountains. The court applied the established law concerning the boundaries of the United States' navigational servitude in tidal and riverine waters in defining the breadth of the federal regulatory jurisdiction, namely, whether the construction was on land beneath mean high water (Pet. App. B, 16b). See also *United States* v. *Chicago, M., St. P. & P.R. Co.*, 312 U.S. 592, 596-597: "The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark."[1]

Section 10 of the Rivers and Harbors Act of 1899, 30 Stat. 1151, 33 U.S.C. 403, broadly forbids any excavation, filling or modification of the channel of any navigable water of the United States or construction in any harbor or other waters of the United States without the consent in advance of the United States through the Chief of Engineers. The district court thus properly found that the fill in question was subject to the provisions of that Act and that the consent of the government had not been obtained. As the district court pointed out, petitioner managed "to catch the river at a time when it was to the north, and fix the sandspit permanently while it was temporarily (and partially) above

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[1]Nor did the district court ignore the effect of tidal waters in determining the extent of the federal servitude. The Court has defined mean high water in such contexts as the "mean of all the high tides" over a period of 18.6 years (a complete lunar cycle). *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U.S. 10, 26-27. The district court utilized the mean high tide data available and applied the data in reaching its conclusion that the fill had been placed below the elevation of the mean high tides in that area (Pet. App. B, 16b).

mean high water. If that were permissible, obviously the owner of the northerly spit could have done the same, waiting for the day when the river was flowing to the south. By taking advantage of temporary variations, the river could be pinned down and perhaps much of the estuary could be filled in and eliminated" (Pet. App. B, 22b). Compare *Sanitary District of Chicago* v. *United States*, 266 U.S. 405; *United States* v. *Rio Grande Dam and Irrigation Co.*, 174 U.S. 690, 707-708. There is, in short, no substantial question of law presented by petitioner for this Court to consider.

2. Petitioner's suggestion (Pet. 2, 6) that the district court may have improperly used the vegetation line as the measure of the servitude or extent of 33 U.S.C. 403 is without merit. The court first determined that the fill was largely on land beneath mean high water. Then, because of the difficulty of determining exactly what portion should be removed, the court designated the vegetation line as a visible and appropriate line to use in removing the fill, but not as the test for the applicability of the Act. In any event the court of appeals' modification of the remedy, which does not rely on the vegetation line, renders this question moot.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.